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IN THE

# Supreme Court of the United States

OCTOBER TERM, 19....

No. 1375

JOHN K. McMURRAY,
by his conservator,
Mrs. John K. McMurray,

Petitioner

v.

HENRY WENDELKEN,

Respondent

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY JOHN K. McMURRAY

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JOHN K. McMURRAY
by his conservator,
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Vs. No. 1375

HENRY WENDELKEN, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY JOHN K. McMURRAY

## STATEMENT OF FACTS

The statement of facts recited by the Petitioner, John K. McMurray, in his Petition for a Writ of Certiorari does not fully present the facts pertinent to the issues here involved. Important considerations, such as the fact that Wendelken was the first of several cars in a line of traffic, were omitted. The record showed that following the Wendelken car, at not exceeding one hundred feet (R. 606), was a second car; and to the rear of this second car were three or four other cars (R. 130). In order to fairly and accurately present the pertinent facts in this case, and since the Opinion of the Court below contains a concise statement of these facts, no part of which Statement is challenged, we quote from the Opinion:

"The defendant, Wendelken, was traveling east on U.S. Highway 90 in an open and uninhabited rural area in southern Mississippi. The highway was straight for several miles east and west, four lanes, two contiguous lanes and blacktop asphalt on each side of a 40-foot grass median strip. Defendant was driving in his right hand lane. The asphalt surface on each side of the median was 24 feet.

"The time was about 2:30 p.m. It had been raining off and on and was still misty, but visibility was good. The highway was wet but traction good.

"The median sloped gently to its center from each of the paved strips; it was soft and wet from the rains. There were no obstructions to vision, no intersection, houses or improvements on either side of the highway. The nearest structure was a highway truck stop or restaurant two miles east.

"Wendelken was driving at not in excess of 60 miles per hour; in fact all traffic, eastward and westward, was moving at an even flow of about 60. The assigned maximum speed in the area was 65. Several cars were behind defendant, the nearest about 100 feet.

"Defendant first observed Oldham, the pedestrian, when he was 500 to 600 feet away. Oldham was standing still on the south shoulder about two feet off the pavement and facing north. He was not looking at eastbound traffic and gave no appearance that he was going to cross the road. Nor to defendant did he appear to be drunk. At that point the stabilized shoulder was approximately eight feet wide, bordered by a downward sloping grass area.

"Wendelken did not reduce his speed. When the auto was 200 to 250 feet from the pedestrian, Oldham left his stationary position and took his first step onto the pavement, still facing northward, and continued across. There is no evidence that prior to the moment Oldham began to move onto the pavement he communicated by any physical act or appearance that he was intoxicated. After the accident he was found to be drunk.

"When Oldham stepped onto the pavement defendant took evasive action. There is no evidence that he delayed. He applied his brakes. There is evidence that he blew his horn (the trial court made no finding whether he did or not). He veered to the left. Other cars behind him began to pull to the left

also. Oldham continued to walk northward. To avoid striking him Wendelken drove onto the median, entering it at the moment of passing Oldham, who was then north of the center line strip. In the median he slid out of control, thence into the westbound lanes and collided with plaintiff's automobile traveling in the northmost lane." (338 Fed 2d, 554-5)

## ARGUMENT

### I

### The Court did not fail to apply the Mississippi law applicable to the facts.

Essentially, the Petitioner rests his right to the writ on his claim that the Court below failed to take into consideration the substantive law of the State of Mississippi in arriving at its decision. Nothing could be farther from the truth. A careful reading of the Court's Opinion shows that the Mississippi statutes and the Mississippi cases invoked by the Petitioner were carefully examined.

Section 8176 of the Mississippi Code of 1942 Recompiled, and particularly Paragraph (b) thereof, says that a driver of a motor vehicle must decrease his speed when a special hazard exists with respect to pedestrians or other traffic.

Paragraph (a) of Section 8202 of the same code provides that every pedestrian crossing a roadway at any point other than a marked crossway shall yield the right of way to all vehicles on the roadway. Paragraph (d) of the same section says that notwithstanding the other provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon the roadway.

It will be noted that the above sections have to do with pedestrians' right to use the roadway, and particularly do these sections refer to pedestrians upon the roadway and not off the roadway

The Petitioner places great emphasis on Avery v. Collins, 71 Miss. 636, 157 So. 695, decided in the year 1934. This case has little resemblance, if any, to the case in hand. In Avery v. Collins the operator of the automobile was driving westwardly on a public highway in an unincorporated settlement called Cranfield, Mississippi. At this point the highway crosses a railroad and then proceeds westerly alongside the railroad upon level and open ground. After the appellant, or driver of the vehicle, had crossed the railroad and had reached a point about 50 feet beyond and west of the crossing, he saw the deceased, a boy

thirteen years of age, about 150 to 175 feet further west, walking in the road and about four feet from his right hand side thereof. This gravel road was only 18 feet wide. The deceased was walking westwardly with his back to the approaching automobile. In the instant case, the pedestrian, when first noticed, was standing entirely off of the paved portion of a four-lane arterial highway. The pedestrian was a mature man, having an unobstructed view of all approaching traffic. Moreover, in the Avery v. Collins case, the Court was careful to say that no case of sudden emergency was presented by the facts.

In the case of McMinn v. Lilly, 60 So. 2d 603, a child was riding a bicycle and suddenly turned into the side of a truck. The child was using the highway, as he had a right to do. This case further points out that although a motorist is required to use due care when seeing a child upon the highway, recognizing that a young person will not always act to protect himself from danger as will a mature adult, still the rule does not impose liability if the motorist uses all reasonable precaution to avoid an accident and the sudden act of the child creates an emergency, rendering it impossible for the motorist to avoid hitting the child. Likewise, Stevenson v. Robinson, cited in 37 So.2d 568, has to do with children walking along the highway, using it for a walkway; and in substance, the same rule is advanced.

In the case of Layton v. Cook, 160 So.2d 685, cited by the Petitioner, we

have a complete departure from all relevance to the case at hand. In that case, the Court was concerned with a motorist who saw an oncoming automobile approaching with extremely bright and blinding lights while he was driving in excess of the speed limit, and in which case the motorist did not slow down or see the boys walking along the shoulder of the roadway.

II

The Court below gave full force and effect to all applicable Mississippi law.

The Court below concluded, and correctly so, that both the Petitioner and the Respondent were victims of the actions of the drunk pedestrian, Oldham. The evidence conclusively showed that Wendelken was guilty of no negligence causing or contributing to McMurray's injuries. When Oldham, the pedestrian, walked from a place of safety into the paved portion of the highway, he created an emergency not of Wendelken's making. When this event happened, Wendelken immediately decreased his speed and veered to the left, blowing his horn (R. 282-283-284-285). To have taken a different course of action would have been disastrous to the occupants of the cars to the rear of him. Thus we see that Wendelken acted as any reasonable and prudent person would have done under similar circumstances when faced by sudden emergency.

At no time prior to the accident did Wendelken know that Oldham was intoxicated (R. 645).

The Mississippi law applying to this case was followed implicitly. The case is comparable to Majure v. Herrington found in 139 So. 2d 635. This is a Mississippi case, decided in the year 1965. In this case, Mrs. Irby Majure filed a suit in Circuit Court of Lauderdale County against Mrs. Sally E. Herrington and her husband, Dr. James E. Herrington, seeking to recover damages for personal injuries. The jury returned a verdict in favor of the defendants. The accident occurred about 3 o'clock P.M., August 7, 1960, and the plaintiff charged in her declaration that the appellees were guilty of negligence in the operation of their automobile by Sally E. Herrington in that she "lost control of the automobile and ran across the center line of the highway and caused her automobile to collide with the automobile in which the appellant was riding at the time the automobile in which she was riding was on its proper side of the highway." At the time of the accident, the plaintiff, Mrs. Majure, had visited her daughter in Slidell, Louisiana, and was in route from Slidell to Union, Mississippi, traveling north on U.S. Highway 11. Mrs. Herrington was proceeding south, and on reaching the crest of a hill saw three automobiles approaching in the northbound lane, heading north, and a fourth car, a blue Ford

automobile, approaching at a rapid rate of speed in a northerly direction and in Mrs. Herrington's own lane of travel. This blue Ford was only a few car lengths ahead of her, and she saw no way to avoid a head-on collission except by turning to her right and onto the west shoulder of the highway. This she did, and she stated that the roughness of the shoulder of the highway and the wheels of her car striking some obstacles on the shoulder of the highway caused her to lose control of the movements of her car. She applied her brakes to the extent she thought safe, but was afraid to lock the brakes for the reason that to do so might have upset the automobile. She was unable to bring her car under control before she collided with the Majure automobile, which was still traveling north but in the east traffic lane of the highway. The plaintiff had requested a peremptory instruction which the lower court had refused, and the Supreme Court of Mississippi said that there was no error in the lower court's refusal to grant such an instruction; "The appellees' defense throughout the trial was that the plaintiff's injury was proximately caused, not by the negligence of the defendants, but by an interviewing independent and efficient cause, to-wit: The negligent and reckless act of the unknown driver of the blue Ford automobile in turning into the southbound traffic lane of the highway only a few feet below the crest of the hill and forcing the defendants' automobile off of the highway and onto the

rough shoulder, thereby causing the operator of the defendants' car to lose control of its movements."

The Court further said: "The rule is well settled that, 'Where the operator of a motor vehicle is by a sudden emergency, not caused in whole or in part by him, placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same coolness, accuracy of judgment, or degree of care as is required of him under ordinary circumstances, or of one having ample opportunity for the full exercise of judgment, and is not liable for injuries caused by his vehicle if an accident occurs, provided he exercises ordinary or reasonable care or prudence, considering the stress of the circumstances, to avoid an accident, * * *.'" 60 C.J.S. Motor Vehicles §257a, p. 624, 625. See also Vann v. Tankersly, 164 Miss. 748, 145 So. 642; Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 108 So. 2d 409; Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333; Fink v. East Miss. Electric Power Ass'n, 234 Miss. 221, 105 So. 2d 548.

In discussing the degree of care required of a motorist confronted by a sudden emergency not caused by him, this Court, in Moore v. Taggart, 233 Miss. 389, 102 So.2d 333, quoted with approval the statement in 1 Blashfield,

Cyclopedia of Automobile Law and Practice, Vol. 1, Part 2, Perm. Ed., Sec. 668, pp. 538-545, which is as follows:

> "When one is confronted with a sudden peril requiring instinctive action, he is not, in determining his course of action, held to the exercise of the same degree of care as when he has time for reflection, and, in the event that an automobilist suddenly meets with an emergency which naturally would overpower the judgment of a reasonably prudent and careful driver, so that momentarily he is thereby rendered incapable of deliberate and intelligent action, and as a result injures a third person, he is not negligent, provided he has used due care to avoid meeting such an emergency and, after it arises, he exercises such care as a reasonably prudent and capable driver would use under the unusual circumstances, which is usually for the jury."

In Carey-Reed Co. v. Carney, a Mississippi case decided by the Fifth Circuit Court of Appeals and found in 117 Federal 2d at page 108, the Court held that the reasonable care which a motorist must exercise to avoid injury is the care which a reasonably prudent man would use under the same or similar circumstances. In the Carey-Reed case an employee of this company, one J. D. Shaver, Jr., was driving an automobile

along a highway south of Clarksdale, Mississippi, at a reasonable rate of speed, when he saw a man walking along the road. The man began to walk diagonally across the road into the path of the Shaver car and motioned for Shaver to stop. Shaver sounded his horn and reduced his speed, and as he came nearer to the man, the pedestrian kept walking, forcing Shaver into the ditch on the right side of the road. The appellee contended the pedestrian was drunk. The Court said, "There is nothing in the record to show that Shaver knew or ought to have known that Jackson was drunk or incapacitated. His alleged intoxication can therefore have no bearing upon this case." Shaver was driving at a moderate rate of speed when he first saw Jackson; he sounded his horn and reduced his speed; he tried to go around Jackson, and, in attempting to do so, he ran his car off the road, striking the stranger as the car ran into the ditch. Under these circumstances, the Court held that defendant's employee was "in no wise negligent."

## CONCLUSION

It is respectfully submitted that the Petition herein does not present a case of which the Court should take jurisdiction on writ of certiorari under Rule 19 of the Court's rules. The decision of the Court of Appeals below is not in conflict with any decision of another court of appeals on the same

matter, nor does it conflict with any applicable state or territorial law; nor does it decide any important question of Federal law which has not been but should be settled by the Supreme Court; nor has the Court below decided the Federal question in a way which conflicts with applicable decisions of this Court.

Quite to the contrary, this case involves an automobile accident wherein both the original plaintiff and the original defendant were victimized by a pedestrian who after the accident appeared to be drunk. The real culprit was the pedestrian, and it would be a gross miscarriage of justice to assess damages against anyone other than the party at fault.

Respectfully submitted,

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## CERTIFICATE

I certify that I have this day served a copy of the foregoing brief upon John Joseph Leahy, 532 Munsey Building, Washington, D.C. 20004, by First Class United States Air Mail, postage prepaid, and upon Mark Clarke Fedota and Louis Fondren by First Class United States Mail addressed to their post office address, Post Office Box 506, Pascagoula, Mississippi, 39567.

This, the _____ day of _____, A.D. 1968.

_____

David Cottrell, Jr.
Of Counsel for Henry Wendelken, Respondent